IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 448

R. E. HOOD,
Petitioner,

vs.

RUBY GAY HOOD,
Respondent.

ON PETITION FOR CERTIORARI

REPLY BRIEF OF PETITIONER

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STATUTES INVOLVED

G.S. Kan. 1949, 60-306:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

* * *

"*Third.* Within two years: * * * an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

ARGUMENT AND AUTHORITIES

Brief reply to matters not discussed in the petition for certiorari may aid the court in consideration of the petition.

I. Respondent's Heading 2, Pages 14-18

It is asserted that the divorce decree could not have been an adjudication of respondent's claim because it had not accrued at the time of entry of the decree. (Brief p. 14)

"Aside from the question of when a statute of limitations begins to run, * * * a cause of action in deceit accrues immediately on the successful consummation of the fraud." 37 C.J.S. *Fraud*, Sec. 71.[1]

As pointed out on pages 7 (note 4) and 31 (note 22) of the petition for certiorari, no question of limitations is involved, the divorce decree having been pleaded in the answer in the case at bar ten months prior to expiration of the statutory period for seeking vacation of that part of the divorce decree relating to property rights.

The case of *Pierson* v. *Holdridge*, 92 Kan. 365, 140 Pac. 1032 (Brief, 14) related to the Kansas statute of limitations,

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1. *Reconstruction Finance Corp.* v. *First National Bank of Cody*, D.C. Wyo., 17 F.R.D. 397, 403-404; *Garrett* v. *Perry*, 53 Cal. 2d 178, 346 P.2d 758, 760-761; *Union Central Life Ins. Co.* v. *Scheidler*, 130 Ind. 214, 29 N.E. 1071, 1072; *Ligon* v. *Minton*, Ky. , 125 S.W. 304, 305; *Trayne* v. *Boardman*, 207 Mass. 581, 93 N.E. 846; *Bradford* v. *Neill*, 46 Minn. 347, 49 N.W. 193; *Burling* v. *Allvord's Estate*, 77 Neb. 861, 110 N.W. 683; *Wright* v. *Noyes*, 80 N.H. 172, 115 Atl. 273, 274; *Horne* v. *Cloninger*, 256 N.C. 102, 123 S.E.2d 112, 113; *Bridenstine* v. *Gerlinger Motorcar Co.*, 86 Ore. 411, 168 Pac. 73; *Stephens* v. *Wheeler*, 193 Wis. 164, 213 N.W. 464.

G.S. Kan. 1949, 60-306. Subdivision *Third* of that statute provides a two year limitation for "an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until discovery of the fraud." (*supra* p. 1)

The only other authorities cited are 37 C.J.S., *Fraud*, Section 64 and 24 Am. Jur., *Fraud and Deceit*, Section 200. These authorities have no relation whatever to accrual of a cause of action for fraud and deceit.

The fact that the claim had accrued prior to the entry of the decree is thoroughly demonstrated by the Kansas cases holding that identical misrepresentations of a spouse's property, discovered subsequent to the divorce decree, constituted extrinsic fraud authorizing vacation of a divorce decree approving a property settlement. *Cunningham* v. *Cunningham*, 178 Kan. 97, 283 P.2d 405[2]; *Hodge* v. *Hodge*, 186 Kan. 361, 349 P.2d 947.

II. Respondent's Heading 3, Pages 18-22

The cases cited on pages 18 and 19 of respondent's brief in which judgments were vacated for extrinsic fraud are all cases in which the statutory procedure for vacation was followed by the filing of a petition in the identical case in which the judgment had been rendered.

III. Respondent's Heading 4, Pages 23-24

The cases cited under this heading were all decided prior to *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64. There is no longer any Federal Common law in diversity cases.

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2. This case affirmed the identical trial judge who rendered the decree of divorce involved in the case at bar (R. 8), and who would have heard the petition to vacate the decree if respondent had availed herself of the statutory procedure for vacation of judgments.

The Federal court was bound and limited by Kansas law to the same extent as a Kansas court of general jurisdiction.

Respectfully submitted,

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